

APPEAL NO. 031015
FILED JUNE 9, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 17, 2003. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) impairment rating (IR) was zero percent. The claimant appealed, arguing that the designated doctor, Dr. J, did not possess the qualifications required by the applicable statute and rules; that Dr. J did not perform the requisite tests required by the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides); and that there was no valid certification of maximum medical improvement (MMI). The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

It was undisputed that the claimant sustained a compensable injury on _____, caused by inhalation of toxic fumes and vapors in the course and scope of her employment. The claimant contends on appeal that the IR assigned by Dr. J is invalid and should be disregarded because there was no valid certification of MMI. The claimant correctly notes that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(b)(B)(2) (Rule 130.1(b)(B)(2)) requires that MMI must be certified before an IR is assigned. However, the benefit review conference (BRC) report shows that the parties agreed that the claimant reached statutory MMI as of January 30, 2002. No response to the BRC report was in evidence and the date of MMI was not a contested issue at the CCH for the hearing officer to resolve.

The claimant argues that Dr. J was not qualified to serve as a designated doctor in this case. Section 408.0041(b) provides in relevant part that the designated doctor should be one:

[W]hose credentials are appropriate for the issue in question and the injured employee's medical condition. The designated doctor doing the review must be trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition, and the treatment and procedures performed must be within the scope of practice of the designated doctor.

Rule 130.5(d)(2)(C) provides that:

If at the time the request is made, the [Texas Workers' Compensation Commission (Commission)] has previously assigned a designated doctor

to the claim, the commission shall use that doctor again, if the doctor is still qualified as described in this subsection and available. Otherwise, the commission shall select the next available doctor on the commission's Designated Doctor List who:...has credentials appropriate to the issue in question, is trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition, and whose scope of practice includes the treatment and procedures performed. In selecting a designated doctor, completed medical procedures may be considered secondary selection criteria.

Whether or not Dr. J is qualified to serve as a designated doctor is a threshold issue that must be resolved before the question of whether the rating is entitled to presumptive weight is reached. The claimant's compensable injury was to her respiratory system and the evidence reflected that she had been treated with oxygen, antihistamines and pain medications and had undergone various pulmonary function tests. Dr. J is identified as an orthopedic surgeon in his designated doctor evaluation report dated September 16, 2002. The hearing officer notes in his Statement of the Evidence that Dr. J was a known orthopedic specialist and was selected as the designated doctor according to the Commission's computer selection matrix, which identified Dr. J as the next doctor on the list with respiratory qualification. However, the claimant correctly notes that the Commission's computer selection matrix was never in evidence or mentioned at the CCH. It is not clear from the record the "respiratory qualification" that Dr. J holds. The parties did not have an opportunity to review and respond to the documents the hearing officer apparently looked at, nor are they part of the record.

The carrier argues in its response that the claimant did not present any evidence that Dr. J was not qualified to render the IR in this matter. While we agree that the burden of establishing that the designated doctor is not qualified rests with the party disputing the qualifications, in this case there was evidence that Dr. J was an orthopedic surgeon. The better practice would have been for the claimant to develop more evidence regarding the medical qualifications of Dr. J. However, we cannot agree that the scope and practice of an orthopedic surgeon would include the treatment and procedures performed for a patient with respiratory conditions such as the claimant. See Texas Workers' Compensation Commission Appeal No. 022770, decided December 17, 2002.

Further, the AMA Guides provide that "a forced expiratory maneuver must be performed during the examination and evaluation of each patient for permanent pulmonary impairment." The claimant testified that Dr. J's only physical examination consisted of listening to her chest with a stethoscope. The designated doctor's evaluation dated September 16, 2002, indicates, and the hearing officer specifically found, that Dr. J relied upon the existing medical records to determine the claimant's IR. The evidence does not reflect that the testing required by the AMA Guides was performed during, or as a part of the examination by the designated doctor. We note that the designated doctor is not prohibited from relying on other testing in determining

an IR. Further, there may be circumstances in which the designated doctor may not be able to complete the required testing. However, such circumstances should be explained so they can be taken into consideration at the CCH. See Texas Workers' Compensation Commission Appeal No. 970774, decided June 11, 1997.

In Texas Workers' Compensation Commission Appeal No. 950387, decided April 26, 1995, we wrote "[i]f the Commission selects the designated doctor and the validity of the report of the designated doctor is challenged, as was done in this case, the Commission must determine whether the report of the designated doctor is valid and is entitled to presumptive weight." A hearing officer should first determine whether the report of a designated doctor is valid and entitled to presumptive weight before determining whether the great weight of the other medical evidence is contrary to the report of the designated doctor.

In this case, the evidence does not establish that Dr. J was trained and experienced with the treatment and procedures used by the doctor treating the claimant's condition. The requirement that the designated doctor be experienced with the treatments and procedures is embodied in the requirement that the treatments and procedures be within the scope of the doctor's practice. See Texas Workers' Compensation Commission Appeal No. 030737-s, decided May 14, 2003. Further, the record does not reflect that the testing required by the AMA Guides was performed as part of or during the examination by the designated doctor. For these reasons, we find it necessary to remand this case in order for a new designated doctor to be appointed to evaluate the claimant and assign an IR.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**MR. JIM MALLOY
AMERICAN INTERNATIONAL GROUP
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231.**

Margaret L. Turner
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Chris Cowan
Appeals Judge